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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RODOLFO ALVAREZ-PAZ,

Defendant and Appellant.

F037204m

(Super. Ct. No. SC080773A)

**ORDER MODIFYING OPINION
AND DENYING REHEARING**

[CHANGE IN JUDGMENT]

THE COURT

It is ordered that the opinion filed herein on November 15, 2001, be modified in the following particulars:

(1) Under the title "APPELLANT'S CONTENTIONS" beginning on page three, the following new footnote 2 is to be inserted at the end of the second full sentence on page four of the opinion and reads as follows:

The trial court's finding that appellant's section 245, subdivision (a)(1) prior conviction was a strike premised upon the court's apparent assumption that the crime was a "serious felony." (See § 667, subd. (d)(1), and § 1170.12, subd. (b)(1).) One of appellant's two section 667, subdivision (a) five-year enhancements was also based upon the assumption that appellant's section 245, subdivision (a)(1) prior conviction was a serious felony. Section 667, subdivision (a)(1) provides for a five-year enhancement for 'any person convicted of a serious felony who previously has been convicted of a serious felony

in this state" (§ 667.5, subd. (a)(1).) Appellant thus contends that the prosecution's failure to prove that his section 245, subdivision (a)(1) prior conviction was a serious felony constitutes both a failure to prove that it was a "strike" and a failure to prove the allegation that it was a section 667, subdivision (a) prior serious felony conviction. As we shall explain below, we agree with appellant.

(2) Footnote 2 on page seven of the opinion, footnote 3 on page nine, and footnote 4 on page ten are renumbered footnotes 3, 4 and 5, respectively.

(3) On page 11, under the heading "DISPOSTION" the second and third sentences are deleted and are replaced with the following:

The judgment is reversed to the extent that it is based upon findings that (1) appellant suffered a prior felony conviction (within the meaning of California's three strikes law) in 1996 in Tulare County Superior Court case No. 38028, and (2) appellant suffered a prior "serious felony" conviction (§ 667, subd. (a)) in the same 1996 Tulare County case. The district attorney shall have 30 days after the remittitur is filed in which to give notice of his intent to seek retrial of the prior felony conviction allegation and the section 667, subdivision (a) prior serious felony conviction allegation.

This modification changes the judgment. Appellant's petition for rehearing is denied.

Ardaiz, P. J.

WE CONCUR:

Vartabedian, J.

Harris, J.